



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 30, 1996

Ms. Jennifer D. Soldano  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Building  
125 E. 11th Street  
Austin, Texas 78701-2483

OR96-1561

Dear Ms. Soldano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 34452.

The Texas Department of Transportation (the "department") received a request for a copy of the application of Highway Pavement Specialties, Inc. ("Highway") for certification as a Disadvantaged Business Enterprise or DBE. You claim that the requested information is excepted from disclosure under section 552.110 of the Government Code.

Pursuant to section 552.305 of the Government Code, this office informed Highway of the request and of its obligation to submit to this office arguments as to why any claimed exception to disclosure applies to the requested information. Highway replied, claiming that sections 552.101 and 552.110 of the Government Code except portions of its requested information from disclosure.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. No tax return information was submitted to this office for review, but Highway indicates that it submitted corporate and individual federal income tax returns, as well as all schedules and attachments and W-2 forms. If the department has this information, it must be withheld under section 552.101 of the Government Code. See Open Records Decision No. 226 (1979) (information on W-2 form is excepted by 26 U.S.C. § 6103(a)).

Highway also claims that its Employer Quarterly Federal Tax Return for the second quarter of 1994 is excepted from disclosure under section 552.101. However, this return was not submitted to this office for review. To the extent that this return contains "return information," as that term is defined in section 6103(b), it must be withheld. The remainder of the return may not be withheld under section 552.101.

Section 552.110 is divided into two parts: (1) trade secrets, and (2) commercial or financial information. The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.<sup>1</sup>

Highway has not established that any of its requested information is a trade secret within the section 552.110 exception. Therefore, the department may not withhold any of the requested information under the first prong of section 552.110.

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<sup>1</sup>The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

We now address the second prong of section 552.110: commercial or financial information. In Open Records Decision No. 639 (1996), this office established that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act in applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770. "To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Highway claims that it submitted to the department a Balance Sheet and Income Statement (the "balance sheet") with its Application for Certification as a DBE. However, no balance sheet was submitted to this office for review. However, even if it had been, we do not believe that Highway has established that it would suffer "substantial competitive harm" by release of such a document. Therefore, the department may not withhold the balance sheet under the second prong of section 552.110. As Highway does not claim an exception for the remainder of its proposal, the department may not withhold it, except for the tax information addressed above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee  
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Open Records Division

SES/ch

Ref.: ID# 34452

Enclosures: Submitted documents

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